

MOHAMED ADIL v. PUBLIC PROSECUTOR

[A.Cr.J. (Ismail Khan J.) October 17, 1966]

[Malacca — Criminal Appeal No. 10 of 1966]

Penal Code, s. 406 — Criminal breach of trust — Dishonest intention — Failure to account.

The appellant appealed against his conviction and sentence on a charge of criminal breach of trust. The evidence showed that the appellant a headmaster deducted certain sums from the salaries of the teachers as their contributions to a co-operative society. The General Orders required the payment to the society to be made by crossed cheque but the evidence showed that some cheques were made out payable to cash and endorsed by the appellant. The contributions had not been paid to the society.

Held: non-accounting or temporary retention of moneys is not evidence of an offence unless there is dishonest intention and in this case the circumstances gave rise to an inference of dishonest intention and the appellant was rightly convicted.

Cases referred to:—

- (1) *Emperor v. Chaturbhuj Narain Choudhury* A.I.R. 1936 Patna 350.
- (2) *Harakrishnan Mahatab v. Emperor* A.I.R. 1930 Patna 209.
- (3) *J. M. Desai v. State of Bombay* A.I.R. 1960 S.C. 889 at p. 891.

MAGISTRATE'S CRIMINAL APPEAL.

H. B. Ball for the appellant.

Abu Talib bin Othman (Deputy Public Prosecutor) for the respondent.

Ismail Khan J.: The accused was convicted on an amended charge which reads as follows:—

"That you between November, 1964 and March, 1965 at the Sekolah Kebangsaan, Bukit Beruang, Malacca, in the State of Malacca, being entrusted with certain property, to wit, \$1,457.50, committed criminal breach of trust and you have thereby committed an offence punishable under section 406 of the Penal Code."

He was sentenced to three months' imprisonment. This appeal is against both conviction and sentence.

The accused was until his conviction the headmaster of the Sekolah Kebangsaan, Bukit Beruang, Malacca. Under him were four teachers, viz. Abdul Rahman bin Baba, Zaiton bte. Dagang, Harun bin Pit and Mohd. Nor bin Haji Adam. All five of them are members of the Malay Teachers' Co-operative Society.

According to P.W.7, the Organiser of Schools, Malacca, it was the duty of the accused to pay the salaries of the teachers and under F.G.O. 122(3) he is authorized to deduct from their salaries sums payable to the Malay Teachers' Co-operative Society and to pay them to the said Society. Such payment had to be made by a crossed cheque. The school has an account with the Malayan Banking Ltd. which account was operated by the accused.

P.W.10, then sub-accountant in the Malayan Banking Ltd., said that he had sent the following

A advice to the school, namely, that for the month of November, 1964, a sum of \$1,638 was paid to its account; for December a sum of \$1,528; for January, 1965, a sum of \$2,010 and for February \$2,832. This was confirmed by P.W.2, then financial assistant in the Education Department, Malacca, who said that these sums were for payment of the teachers' salaries for those months.

B P.W.8, a clerk in the Malay Teachers' Co-operative Society, said that he prepared a statement in respect of the deductions from the teachers' salaries which was sent to the accused. For the month of November, 1964, the amount was \$555.75, for December, \$556.65, for January, 1965, \$398.55 and for February, \$546.55. These should reach the society within seven days of the payment of the salaries each month.

C On 10th March, 1965, P.W.1, an audit clerk attached to the Ministry of Education, Kuala Lumpur, carried out his audit checks at the school. He examined the paysheets of the teachers for the relevant months, namely, November, 1964 to February, 1965. He found that the teachers had received their salaries from the entries in the paysheets and that deductions had been made towards their contributions to the Co-operative Society. These deductions were set out in a separate sheet prepared by the society. He examined the cheque butts relating to the school accounts. There were the following cheque butts:—

- (1) No. MA/B1 267879 dated 2nd December, 1964;
- (2) No. MA/B1 267881 dated 7th December, 1964;
- (3) No. MA/B1 267896 dated 30th January, 1965;
- (4) No. MA/B1 298708 dated 25th February, 1965.

F From these butts it would appear that cheques had been drawn payable to the society in respect of the teachers' contributions for the months of November, 1964, December, 1964, January, 1965 and February, 1965. The total contributions, including that of the accused, was a sum of \$2,057.50. Deducting the sum of \$600, the accused's share thereof, there was a sum of \$1,457.50 deducted by the accused belonging to the other teachers for payment to the society. At the time of the audit there was no acknowledgment of such payment from the society. The accused was unable to give an explanation. Six days after the audit the accused produced receipts from the society in respect of such contributions. These receipts were dated 17th March, 1966.

G To establish a case against the accused, the prosecution had to prove that the accused was entrusted with the moneys, that he misappropriated them, and that he did so dishonestly.

H There is evidence that the accused had deducted the teachers' contributions from their salaries for payment to the society. He had

drawn out from the school account the teachers' contributions for the month of November on 2nd December, 1964, the contributions for December on 21st December, 1964, the contributions for January on 23rd January, 1965, and the contributions for February on 26th February, 1965. At the time of the audit he was unable to account for them.

Briefly, the defence was that: (1) the charge was defective as it failed to set out particulars; (2) there was no evidence of entrustment, and in any event there was only a delay in the matter of payment to the society.

In the grounds of appeal, the same objections were raised as in the defence. In my view, the charge was correctly framed notwithstanding the omission of certain particulars as these were set out in the schedule to the original charge and the accused was in no way prejudiced. On the question of entrustment, the accused had deducted the teachers' contributions after payment of their salaries. He had to send these moneys to the society. There was therefore clear evidence of entrustment. As to his last objection, it was contended for the accused that at the very highest the evidence shows that there was only a delay in payment of the moneys to the society. This contention would be tenable if it could be shown that the moneys were in the school account at the bank until they were paid to the society. But that is not the position here. The accused had drawn out the various sums representing the teachers' contributions before the audit.

The authorities are clear on the point that non-accounting or temporary retention is not evidence of an offence unless there is dishonest intention. In the case of *Emperor v. Chaturbhuj Narain Choudhury*,⁽¹⁾ at page 352, Rowland J. said:—

"To establish dishonesty therefore it is not necessary that the prosecution should establish an intention to retain permanently the property misappropriated. An intention wrongfully to deprive the owner of the use of the property for a time and to secure the use of the property for his own benefit for a time, may be sufficient. It was so held in 8 Bom. L.R. 951. (*Emperor v. Chhagan Lal*)."

It is however not necessary for the prosecution to establish the manner in which the accused had disposed of the sum drawn out from the bank by the accused, but his dishonest intention can be inferred from the following circumstances. According to F.G.O. 122(3), payment to the society was to be made by crossed cheque. The cheque butts would give the impression that the cheques were made out in the name of the society, but according to P.W.10, the cheques corresponding to these butts were however made out payable to cash and endorsed by the accused.

Fazl Ali J. said in the case of *Harakrishnan Mahatab v. Emperor*:—⁽²⁾

A "It is not necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused, because under the law even temporary retention is an offence provided that it is dishonest; but the essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intentions or not. As the question of intention is not a matter of direct proof, the courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had *mens rea* for the crime. So in cases of criminal breach of trust the failure to account for the money proved to have been received by the accused or giving a false account as to its use is generally considered to be a strong circumstance against the accused. We should however not lose sight of the principle and make a universal formula of what is after all only an indication of or a piece of evidence pointing to dishonest intention."

In a more recent case, *J. M. Desai v. State of Bombay*,⁽³⁾ at page 891, Shah J. said:—

D "... to establish a charge of criminal breach of trust, the prosecution is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion. The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted, if proved, may in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion. Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him, or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account or renders an explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made."

In my opinion the accused was rightly convicted.

G I take into account the fact that the accused had paid the moneys albeit after the audit check. He had a clean record until this lapse. I also consider that in a way the society had conduced to the offence by overlooking his late payments in the past.

H The conviction is upheld. The sentence of three months' imprisonment is set aside and in lieu thereof the accused is sentenced to pay a fine of \$500 in default three months' imprisonment.

Order accordingly.

Solicitors: Allen, Gledhill & Ball.

Sentence reduced to fine of \$500.

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